

**REPORT OF THE SUPREME JUDICIAL COURT COMMITTEE TO
STUDY THE BISHOP-FULLER PROTOCOL
JANUARY 20, 2006**

I. Formation of Committee:

In Commonwealth v. Pelosi, 441 Mass. 257, decided on March 19, 2004, the Supreme Judicial Court stated: "[t]oday we announce the formation of a committee that will study and present to the court alternatives to the current protocol regarding defense access to privileged records in sexual assault cases." Id. at 258 n.1. Associate Justice Martha B. Sosman served as Chairman of the Supreme Judicial Court Committee to study the Bishop-Fuller Protocol Committee. The thirteen Committee members included representatives of those with a role in the protocol: judges, prosecutors, defense counsel, victim/witness advocates, health care providers, and the Department of Social Services. (See Tab 1 for list of members.)

At Justice Sosman's request, Appeals Court Associate Justice R. Marc Kantrowitz served as interim chair when Justice Sosman was unavailable during fall, 2005 and January, 2006.

II. Meetings:

The Committee met at the Supreme Judicial Court's offices twelve times between April 2004 and January 2006. A drafting subcommittee of three members met on several occasions during June - August 2005.

III. Work of the Committee:

The Committee's work is best described in phases.

Phase I: Articulation of Agreed-Upon Principles, Research Regarding Other States' Approaches, and Presentation of Discussion Issues (May - July 2004)

During meetings in June and July 2004, Committee members proposed, discussed, and adopted the following list of "fundamental principles" to establish guidelines for future Committee discussions.¹

¹ Some members of the Committee expressed concern about limiting the protocol to cases involving sexual offenses. They maintained that application of a different protocol in other kinds of criminal cases would create confusion among record holders and privilege holders. In their view, limiting the protocol to cases involving sexual offenses would also suggest that the credibility of victims of sexual offenses is more suspect than that of victims of other offenses.

Other members voiced concern about expanding the application of the protocol beyond cases involving sexual offenses.

Another substantial disagreement concerned whether any protocol should supplement or supplant relevant Massachusetts Rules of Criminal Procedure.

Agreed-Upon Principles²

1. The Committee does not want the innocent convicted.
2. The Committee believes defendants are entitled to fair trials.
3. The Committee does not want the guilty to go free.
4. The Committee will follow statutes so far as constitutionally able.
5. The Committee will respect alleged victims' rights to privacy to the maximum constitutional extent.
6. The Committee seeks efficiency and avoidance of undue delay.
7. The Committee seeks solutions that minimize burdens on providers.
8. The Committee does not want a jury to acquit a defendant based on a victim's having obtained mental health treatment (avoidance of stigma attached to treatment).
9. The Committee seeks honesty from all participants: The Committee should devise a system that is compatible with participants' ethical obligations.
10. The Committee should encourage victims to report crimes and to seek justice through the criminal justice system.
11. The Committee regards a victim's seeking mental health treatment in the aftermath of a trauma as a positive response to the trauma.
12. The Committee believes that a complainant whose records are being sought should have access to legal counsel, as the prosecutor represents the interests of the State.

Survey of Other States

Two Committee members surveyed how the courts in other states respond to defense requests for access to privileged records in sexual assault cases. The Committee found no model that appeared particularly helpful to its deliberations.

Issues for Discussion

Each Committee member submitted proposed issues for discussion in an effort to explore areas of possible agreement and clarify areas of disagreement. Justice Sosman encouraged members to consider ideas "outside the box," and not to be constrained by the Court's past rulings.

The Committee discussed, but did not reach consensus, on several ideas suggested by Committee members, including that:

² The order of presentation has no significance, as the Committee did not prioritize among the principles.

- courts provide victims with attorneys when defendants seek access to privileged or confidential records;
- courts treat pre-incident records differently from post-incident records;
- a review of privileged records be conducted by a tribunal comprised of one judge, one defense attorney, and one prosecutor; and
- a medical expert be available to assist a judge with any review of records.

Phase II: Exploration of a Pilot Project (Sept. 2004 - Jan. 2005)

Beginning in September 2004, the Committee considered the possibility of providing counsel for victim-witnesses when a defendant seeks access to privileged records. There was general agreement that providing counsel would accomplish many objectives, including: (a) providing information to the victim-witness and representing her interests; (b) minimizing the confusion and conflicts that sometimes occur when the Commonwealth's interests and the victim-witness's interests diverge; and (c) increasing the likelihood that defense counsel and the victim's attorney might reach a negotiated resolution regarding the extent of production of arguably privileged records.

The Committee also recognized the challenges both of seeking state funding for attorneys to represent victim-witnesses and of identifying and training pro bono attorneys to represent victim-witnesses for this limited purpose. The Committee decided to propose a small pilot project to test the value of providing counsel for victim-witnesses in these circumstances.

After Justice Sosman discussed the proposed pilot project with the Justices, it was suggested that the implementation of Standing Order No. 2-86, which sets forth time standards for criminal cases in the Superior Court, would make it impractical to devote time and resources to a pilot project at this time.

Phase III: Recognition that the Committee would not Reach Resolution and Preparation of Alternative Proposed Protocols (Feb. - Sept. 2005)

In response to the Court's request, the Committee explored the possibility of agreeing to one proposed protocol. After much discussion and deliberation, the Committee determined that agreement among the members was not possible, and that the Justices should instead be presented with three alternative protocols. This consensus reflected the members' beliefs that they could not reconcile what may be irreconcilable: competing visions of the rights of defendants and victim-witnesses. The Committee determined that one of the proposals would most closely resemble the protocol adopted in Commonwealth v. Stockhammer, 409 Mass. 867 (1991); another would most closely resemble the protocol adopted in Commonwealth v. Bishop, 416 Mass. 169 (1993) and Commonwealth v. Fuller, 423 Mass. 216 (1996); and the third would fall somewhere between the others, although the review of produced documents would be conducted by a judge.

The Committee also agreed that each of the protocols would be informed by: the Committee's agreed-upon principles; Standing Order 2-86 (time standards); the discussions and feedback provided by the Committee; and relevant cases decided by the Court since the Committee's establishment, including Commonwealth v. Lampron, 441 Mass. 265 (2004), which was decided the same day as Commonwealth v. Pelosi. The Committee also recognized that any protocol must meet standards set forth in the federal Health Insurance Portability and Accountability Act (HIPAA). The relevant HIPAA regulations are contained in 45 C.F.R. § 164.512.

Three Committee members volunteered to serve as primary drafters of the alternative protocols. During several meetings held from March through June, 2005, Committee members discussed and provided feedback on each of the draft protocols. The drafters met several times during July and August, 2005, to discuss strategies for narrowing differences among the proposals.

Final versions of the proposed alternative proposals were circulated to Committee members in September 2005. (See Tabs 2-4).

Phase IV: The Committee Attempt to Consolidate Alternative Protocols into One Document (Sept. - Dec. 2005)

At a September 30, 2005 meeting, several members observed the alternative protocols were similar in many respects, and the Committee agreed that it might be helpful to the Court if the proposals were consolidated into one document that would indicate areas of agreement and disagreement. A member volunteered to draft this comprehensive document.

On November 9, 2005, this consolidated proposal was circulated to the members who had drafted the three alternative protocols. The proposed consolidated protocol contained two parts: Part I included a list of procedural steps; Part II included those steps and accompanying commentary. The drafters of the alternative protocols were invited to comment; one drafter provided detailed comment which would have necessitated a response from a drafter who, due to health reasons, was unavailable to reply.

Phase V: Committee Submits its Work Product to the Supreme Judicial Court (Jan. 2006)

At the Committee's meeting in January 2006, the members agreed that the Committee would not be able to receive comments on the consolidated proposal and iron out areas of disagreement in a timely fashion. Some members also believed that the consolidated proposal would not adequately reflect the significant divergence of views among the three alternative approaches. The Committee was aware that the Supreme Judicial Court had granted the defendant's motion for direct appellate review in Commonwealth v. Sean Dwyer (SJC-09563).

At their meeting on January 10, 2006, Committee members unanimously agreed to submit the following items to the Supreme Judicial Court: A letter from the Committee (with this

Report as an attachment to the letter) addressed to the Justices of the Supreme Judicial Court with the following documents:

Tab 1. List of Committee Members

Tab 2. Proposed Alternative Protocol A

Tab 3. Proposed Alternative Protocol B

Tab 4. Proposed Alternative Protocol C

Members also agreed to convey to the Court their opinion that despite their various and differing views on a highly charged issue, the members unfailingly worked together in a spirit of collegiality and professionalism.